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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 507.

INTERSTATE COMMERCE COMMISSION, THE WIL-
LETT COMPANY OF INDIANA, INC., AND THE PENN-
SYLVANIA RAILROAD COMPANY, APPELLANTS,

v.

HARRY A. PARKER, DOING BUSINESS AS PARKER
MOTOR FREIGHT, REGULAR COMMON CARRIERS
CONFERENCE OF THE AMERICAN TRUCKING
ASSOCIATIONS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF INDIANA.

REPLY BRIEF OF APPELLANTS, THE WILLETT
COMPANY OF INDIANA, INC., AND THE
PENNSYLVANIA RAILROAD COMPANY.

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I STATEMENT OF PRINCIPAL CONTENTIONS AD-
VANCED BY APPELLEE-PROTESTANTS.

The briefs which the protesting motor carriers, ap-
pelees in this Court, have filed in opposition to the briefs

of the Interstate Commerce Commission, the Willett Company and The Pennsylvania Railroad Company, contain so many misleading and erroneous statements and contentions that it is impossible to answer all of them. However, an analysis of their various claims shows that they can be reduced to the following principal contentions:

1. The policy which the Interstate Commerce Commission has established for handling cases where a railroad or its wholly-owned motor carrier subsidiary applies for permission to operate in substituted service for the railroad, and which the Commission has followed in this case, is alleged to resolve itself into permitting a railroad to use, either directly or through its motor carrier subsidiary, motor vehicles in substituted service operations regardless of the facilities of existing independent motor carriers. (See brief of appellee Parker, pp. 47-65). This is claimed by the appellee-protestants to be an erroneous and unlawful policy for the following alleged reasons:

a. This policy ignores the intent of Congress expressed in the Interstate Commerce Act, to prevent an oversupply of transportation facilities (see brief of appellee Parker, pp. 37-39, 41);

b. The statutory standard of "public convenience and necessity," by which the Commission must be guided in these cases, should be construed as requiring a showing that the facilities of existing independent motor carriers are inadequate to perform the service, because (1) it is so construed by the Commission in railroad extension cases and in other types of motor carrier cases, as, for example, where an independent motor carrier seeks to engage in new over-the-road operations (brief of appellee Parker, pp. 65-75), and (2) such construction is supported by various state court decisions.

under allegedly comparable state statutes (brief of appellee Parker, pp. 79-84);

c. In adopting and following the policy which it applies to these cases, the Commission has confused "public interest" with "public convenience and necessity," and this is erroneous because the two terms are not the same under the statute, and what is found to be in the public interest may not satisfy the requirements of public convenience and necessity (brief of appellee Parker, pp. 75-78; brief of appellee Norwalk Truck Line Co., pp. 15-16);

2. The policy of the Commission with respect to these cases is said to ignore the alleged intent of Congress that the railroads should be excluded from the motor carrier field, or admitted to it only under rare and limited circumstances, the reason claimed for this supposed intent on the part of Congress being the asserted danger that the railroads would invade the motor carrier field for the purpose of destroying competition from independent motor carriers (brief of appellee Parker, pp. 41-45, 96-97; brief of appellee Norwalk, pp. 15-16).

3. It is further contended that the application in this case is defective in that it should have been made by the Railroad, rather than by the Willett Company, under the decision of this Court in the *Thomson* case (brief of appellee Norwalk Truck Line Co., pp. 13-15), and in that it seeks a common carrier certificate rather than a contract carrier permit (brief of appellee Parker, p. 91; brief of appellee Norwalk, pp. 11-13).

4. Finally, the appellee-protestants urge that, under the recent decision of this Court in the so-called *Seatrail* case, the Commission has the power to compel the coordination of operations and the establishment of joint rates between rail and motor carriers, and that therefore the alleged reasoning of the Com-

mission, in allowing a railroad to use its own motor carrier subsidiary for the performance of substituted service because otherwise it would have to depend on the voluntary cooperation of the existing independent motor carriers, is erroneous (brief of appellee Norwalk, pp. 20-22).

II. STATEMENT OF PRINCIPAL POINTS WHICH ANSWER THE CONTENTIONS OF APPELLEE-PROTESTANTS.

Before considering specifically and separately each of these and other claims which the appellee-protestants advance, it should be noted that there are four principal points which constitute a sufficient answer to the protestants' principal contentions and which, although they have been fully set forth in the brief previously filed in this Court in behalf of the Willett Company and The Pennsylvania Railroad Company, may be briefly restated here as follows:

1. Congress has in the Interstate Commerce Act declared a policy of fostering coordination of motor and rail transportation for the purpose of improving service to the public and promoting economy and efficiency of operations, and has vested in the Interstate Commerce Commission a broad administrative discretion to carry out and apply this policy. The policy so declared must be read into the provisions of the Act and supplies a canon of interpretation for those provisions, including the standard of "public convenience and necessity" by which the Commission must be guided in passing upon the establishment of motor routes. The application of this standard is left by the Act to the Commission, with its specialized transportation knowledge and experience in both the railroad and motor carrier fields, and the Commission is peculiarly fitted to determine how the

various forms of transportation may best be coordinated and fitted together. This Court has said many times that the Commission's exercise of its administration discretion in such a situation should not be interfered with by the courts. Two particularly apt expressions to that effect by this Court are to be found in the opinions of Mr. Justice Rutledge in the *McLean Trucking Co.* case (321 U. S. 67) and of Mr. Justice Jackson in the *Inland Waterways Corp.* case (319 U. S. 671), in the passages quoted in the brief heretofore filed in behalf of the Willett Company and The Pennsylvania Railroad Company (pp. 32-33). The principal contentions of the appellee-protestants are addressed to the administrative discretion of the Commission, and do not establish any departure by the Commission from the statutory standards and limits applicable to cases of this character.

2. The type of motor carrier service for which approval is sought in cases like the present one is fundamentally different from other types of motor carrier service in a most important respect, viz., in that the service here involved is proposed as, and only as, a service auxiliary to and supplemental of existing rail service, and as merely a new and improved method whereby the railroad may better perform, to public advantage, a service which it is obligated by law to perform in some manner. This characteristic of the type of service in question is particularly important because it (a) distinguishes this service from the general over-the-road type of motor carrier service, (b) demonstrates that the Commission is not permitting an unnecessary duplication or oversupply of transportation facilities in granting this application since the service is not additional to but is in substitution for an existing service, and (c) disposes of the fears which protestants and other independent

motor carriers profess to have, that they will be driven out of the motor carrier business by the entry of the railroads into the motor carrier field. The Commission has repeatedly recognized the importance of this distinction by making it plain that, while it will permit railroads to substitute motor for rail operations as a new and improved method of performing the service which the railroads are obligated to perform in any event, it will limit the railroads to motor vehicle operations which are auxiliary to and supplemental of rail operations and will not permit the railroads to enter the motor carriers field to the extent and for the purpose of engaging generally in over-the-road trucking in competition with independent motor carriers.

3. The Commission's established policy with respect to substituted service cases of this character does not ignore the question of whether the proposed service could be satisfactorily supplied by the existing independent motor carriers, but on the contrary includes a requirement that a showing be made that the service could not be *as well or satisfactorily* supplied by existing independent motor carriers, as a prerequisite of the Commission's grant of approval.

4. What the Commission is doing in this case, and has done in other cases of this kind, is to carry out one of the paramount purposes of the Interstate Commerce Act—viz., to foster coordination of the various forms of transportation for the purpose of improving service and promoting economy and efficiency of operations—by making possible improvements in the railroads' transportation service, through the coordination of rail and motor operations, in such manner as will redound to the substantial advantage of the shipping public and will result in a saving of transportation costs and an increase of transportation efficiency, and will at the same time preserve rather than restrain healthy competition.

III. DISCUSSION OF SPECIFIC CONTENTIONS OF APPELLEE-PROTESTANTS.

The first principal claim of the appellee-protestants is that the Commission has in cases of this sort erred in establishing and applying an alleged policy whereby it permits a railroad or its motor carrier subsidiary to engage in motor vehicle operations in substituted service for the railroad, wholly regardless of the facilities of existing independent motor carriers. The answer to this contention is, first, that it does not fully or correctly state the Commission's policy with respect to cases of this kind, and secondly, the policy which the Commission has in fact established and applied in these cases is not erroneous or in violation of the provisions and purpose of the Interstate Commerce Act.

A. Protestants' Contention that the Commission Disregarded the Question of Whether the Proposed Service Could be Satisfactorily Supplied by Existing Independent Motor Carriers is not Correct, Because the Commission Did in Fact Require a Showing that the Service Could not be Satisfactorily so Supplied.

It is wholly erroneous to say that the Commission in these cases disregards the question of whether or not existing independent motor carriers could satisfactorily supply the proposed service. On the contrary, as pointed out in the brief previously filed herein for the Willett Company and The Pennsylvania Railroad Company (p. 43), the Commission, in laying down its policy for cases of this character in the first *Kansas City S. Transport Co.* case, expressly and at some length discussed and considered the question whether the useful public purpose furthered by substituted service could be "served as well by existing lines or carriers" (emphasis supplied) (p. 234 of 10 M. C. C.). It again reviewed this question at still greater length in its opinion in the second *Kansas City S. Trans-*

port Co. case (pp. 47-49 of brief of Willett Company and Pennsylvania Railroad Company). As a result of this extensive and careful consideration of the question, the Commission concluded that the question was relevant and important and that in substituted service cases it should be shown that the proposed substituted service could not be provided *as well or satisfactorily* by existing independent motor carriers. It also concluded that that requirement would be satisfied in such cases by showing that the substituted service if provided by existing independent motor carriers would depend on voluntary cooperation between the railroad and a number of such existing independent motor carriers, each with its own separate operating schedules and arrangements, and would therefore be likely to be lacking in important elements of coordination.

In all cases of this character, involving applications by a railroad or its motor carrier subsidiary for permission to engage in substituted service, the Commission has followed the precedent which it thus set for itself in the *Kansas City S. Transport Co.* cases, and has required that a showing be made that the proposed service could not be *as well or satisfactorily* supplied by existing independent motor carriers (see pp. 50-52 of brief of Willett Company and Pennsylvania Railroad Company). So also, in the case at bar, the Commission has followed the policy thus established by it with respect to cases of this character, and has found on the basis of the record before it that the proposed substituted service could not be satisfactorily supplied by existing independent motor carriers (see brief of Willett Company and Pennsylvania Railroad Company, pp. 62-67).

What the appellee-protestants' contention in this respect really amounts to is an attack on the Commission's findings based on the evidence before it. What they are asking this Court to do is to go behind the Commission's

findings in this respect, analyze the record and the evidence before the Commission, and come out with the conclusion that the Commission did not properly evaluate that evidence and that it erred because it did not make findings different from those which it did make: Appellee-protestants cannot rightly claim that the Commission made no finding on this point, because the Commission's report, after reviewing the facts established by the evidence, expressly states (R. 11) that in its opinion, "the proposed coordinated service will serve a useful public purpose, and that *such useful public purpose cannot be served as well by existing motor carriers.*" (Emphasis supplied.) The Commission thus expressly found that it would not be satisfactory to use existing independent motor carriers for the furnishing of this service, and the contention of the appellee-protestants in this respect can therefore have significance only as an attack on the factual basis for this finding.

Viewed in that light, their contention is answered, first, by the presumptive weight to be attached to the findings made by the Commission in the discharge of its administrative duties under the Act, and secondly, by the fact that the Commission's finding in this respect was supported by evidence to the effect (a) that none of the existing independent motor carriers served all of the points in question on the railroad's line, (b) that the existing separate schedules of independent motor carriers would not fit properly into connecting rail movements and would necessitate substantial rearrangements, (c) that actual experience on the part of the railroad in utilizing independent motor carriers had proven unsatisfactory, and (d) that, since the service of the applicant would be operated under a "synchronized management" with the railroad, it would be likely to result in better coordination with the railroad's own operation than would be the case if the railroad were forced to depend on the voluntary co-operation of the existing independent motor carriers (see

brief of Willett Company and Pennsylvania Railroad Company; pp. 62-64).

For example, protestant Parker, one of the principal protestants before the Commission and one of the principal appellees in this Court, testified that he served no intermediate points between Grand Rapids and Cadillac, Michigan, which constitutes a substantial portion of the route over which the proposed substituted service would be operated (R. 443; Ex. No. 2, opp. R. 424). A witness representing the Norwalk Truck Line Company, another principal protestant and appellee, testified that the Norwalk Line did not operate over the direct route between Sturgis and Kalamazoo, Michigan, on the main route which the proposed substituted service would cover (R. 518; Ex. No. 2, opp. R. 424). Still another protestant, the Darling Truck Line, indicated through its witness that there were a substantial number of towns, on the routes in question, which it did not serve (R. 598). The representative of still another protestant, Associated Truck Lines, testified, with respect to the operating schedule that would be required in order to coordinate the proposed service properly with the railroad's operations, that "We wouldn't be able to operate under this schedule . . . and at the same time continue to compete with other trucking competition" (R. 637). A witness for the railroad testified that the railroad had been employing the services of an independent motor carrier for performing substituted service between Cadillac and Lake City, Michigan since 1939, and that the service as so performed had not been satisfactory and would be expedited and improved if it were performed by the applicant Willett Company (R. 390). Various shippers testified that the proposed substituted service, with the improvement which it would bring in the railroad's over-all service, would be most desirable, and in some instances a practical necessity, from their standpoint. For instance, a witness representing an important shipper of various kinds of

steel equipment testified, with respect to its shipments, that the shipper would "demand that I get them in there the quickest way I can, and the customers are going to demand that I get them out the quickest way I can," and that therefore his company wanted the expedited service which would be made possible if the Willett Company's application were granted (R. 268).

Additional evidence to show the impracticability of using the existing independent motor carriers for performance of the substituted service was offered on behalf of the Willett Company and The Pennsylvania Railroad Company, but was excluded upon the objection of the protestants (brief of Willett Company and Pennsylvania Railroad Company, pp. 9-10). Protestants should not be heard to claim that a finding of the Commission is invalid for lack of supporting evidence when evidence in support of it was offered but was excluded on their own objection.

Thus, the policy which the Commission has in fact established and followed with respect to substituted service cases does not, as protestants claim, ignore the question whether existing independent motor carriers could supply the proposed service *as well or satisfactorily*, but on the contrary takes cognizance of that question and requires a showing that the service could not be *as well or satisfactorily* provided by the existing motor carriers.

Even if, however, the Commission's policy did not include the requirement that such a showing be made, it would not necessarily be unlawful or in contravention of the provisions or purpose of the Interstate Commerce Act, for the reasons set forth in the brief filed herein by the Interstate Commerce Commission (pp. 39-42). As there pointed out, it lies within the Commission's administrative discretion, in interpreting and applying the statutory standard of public convenience and necessity, to determine whether such a requirement shall be imposed in cases of this kind. But it is not necessary for this Court to decide in the present case whether the Commission is

obliged by the statute to impose such a requirement, because the Commission has in fact imposed the requirement in this case and other cases of the same kind, and has not granted the permission sought without specifically finding that the requirement was satisfied.

B. The Commission's Established Policy for Handling Substituted Service Cases, Including as it Does the Requirement of a Showing that the Service Could not be as Well or Satisfactorily Supplied by Existing Independent Motor Carriers, is in Accord with the Provisions and Purpose of the Interstate Commerce Act, Including the Provisions Regarding Public Convenience and Necessity, and Does Not, as Protestants Contend, Result in a Wasteful Duplication or Oversupply of Transportation Facilities, Contrary to the Intent of Congress.

As thus actually established and applied, the Commission's policy with respect to these cases is clearly in accord with the provisions and purpose of the Interstate Commerce Act. This has been fully shown in the brief previously filed herein for the Willett Company and The Pennsylvania Railroad Company (pp. 49-59), and there is no need to repeat what has there been said. As was pointed out, the Commission is vested under the Act with broad administrative discretion not only to carry out the declared Congressional purpose of fostering and promoting increased economy and efficiency of transportation, improved service to the public, and coordination of the various forms of transportation, but also to interpret and apply the statutory standard of public convenience and necessity, applicable in cases of this character.

In this connection, however, something should be said about the contention made by appellee-protestants that the Commission has placed upon the phrase "public convenience and necessity" a different construction in cases of this character from that which it has given to the same

phrase in railroad extension cases and in cases of other types of motor carrier applications—such as, for example, the application of an independent motor carrier for permission to engage in general over-the-road trucking over new routes—and that in so doing the Commission has erred as a matter of law. (See pp. 65-75 of brief of appellee Parker.) The claim is made that, in railroad extension cases and in cases of motor carrier applications for permission to engage in new over-the-road trucking operations, the Commission requires a showing of the inadequacy of existing transportation facilities before it will grant the desired permission, but that it does not require such a showing in substituted service cases, that such a showing must be required under the law in all cases where a certificate of public convenience and necessity is sought, because of the Congressional intent to prevent an oversupply of transportation facilities (expressed in numerous passages from Congressional statements and reports quoted by appellee-protestants—see pp. 37-39, 41 of appellee Parker's brief), and that the Commission in any event is not free to place one interpretation upon the phrase "public convenience and necessity" in one type of case and a different one in another type of case. (See p. 71 of brief of appellee Parker.)

There are several answers to this contention. As this Court has expressly recognized, the statutory standard of public convenience and necessity is a broad and loosely defined one, so far as the express provisions of the Act are concerned, and the specific application of that standard to particular types of situations has been left, under the Act, primarily to the administrative discretion of the Commission (see pp. 33-35 of brief of Willett Company and The Pennsylvania Railroad Company). As this Court has expressly stated in *I. C. C. v. Railway Labor Association*, 315 U. S. 373 (1942), both the phrase "public convenience and necessity" and the phrase "public interest" must be construed in the light of and in accordance

with the purpose and policy of the Act (see p/ 35 of brief of Willett Company and The Pennsylvania Railroad Company) and, viewed in that light, the two phrases are not distinguishable. There is nothing in the Act to prevent the Commission from applying these statutory standards in one way in one type of case and in another way in another type of case, so long as ~~the~~ Commission remains within the broad framework of the Congressional policy and purpose as declared in the Act.

Moreover, as already pointed out, the Commission does in fact require in substituted service cases a showing that proposed service *of that special character* could not be as well or satisfactorily supplied by existing independent motor carriers, and therefore the Commission does not in fact apply in these cases a different construction of the statutory phrase "public convenience and necessity" from that which it applies in railroad extension cases and in cases of general over-the-road motor carrier applications.

No Unnecessary Duplication or Over-supply of Transportation Facilities Results from the Performance of Substituted Service by a Railroad or its Subsidiary.

It must be especially borne in mind that the Commission's approach to these substituted service cases must be considered in the light of the important fact that in such cases the proposal before the Commission does not seek to introduce a wholly new and additional transportation service, in duplication of existing transportation services, but merely seeks to substitute for an already existing rail service a new and improved method of performing that service. The handling of less-than-carload freight traffic to, from and between any stations on its rail line is a service which the railroad is obliged by law to render in any event. There is no question here,

as appellee-protestants contend (pp. 75, 95 of brief of appellee Parker and pp. 28-29 of brief of appellee Norwalk Truck Line), of claiming that any particular traffic belongs exclusively to any one carrier or any one form of transportation. The point is, not that any particular traffic belongs to the railroads, but that the railroad is obliged to render the service when requested by shippers to do so, and this obligation on its part continues regardless of whether most or all of the traffic is offered to it or to competing carriers. Since this obligation continues, the railroad must be ready, able and willing to perform this service, and must actually perform the service when requested to do so, and all that is sought in these substituted service cases is the utilization of another type of physical facilities whereby the railroad may continue to perform this existing service in a manner which will improve the service from the standpoint of shippers and will increase its economy and efficiency from the standpoint of the railroad.

This fact constitutes an answer to the contention advanced by appellee-protestants (see pp. 37-41 of brief of appellee Parker), that the Commission's policy with respect to these substituted service cases is inconsistent with the Congressional purpose introduced into the Interstate Commerce Act by the Transportation Act of 1920 and reaffirmed in the Motor Carrier Act of 1935 and the Transportation Act of 1940—to prevent an oversupply of transportation facilities. Since the enactment of the Transportation Act of 1920, it has of course been the expressed Congressional purpose, as this Court has frequently recognized, that the Interstate Commerce Act should be so administered as to foster sound economic conditions in transportation and develop, coordinate and preserve an adequate national transportation system, and, with that objective in view, to minimize wasteful and unnecessary duplication of transportation facilities. The claim of appellee-protestants is that the Commission, by

permitting a railroad, either directly or through its motor carrier subsidiary, to engage in substituted service when there are independent motor carriers operating in the same territory, is permitting a wasteful and unnecessary duplication of transportation facilities. But this contention ignores the real nature of substituted service and its relation to existing transportation facilities.

Before the proposed substituted service is inaugurated, there are in existence two kinds of service in the territory in question, viz., rail service, and motor carrier service, the latter being usually provided by a number of separate motor carriers operating independently of each other and of the railroad, and operating in competition with the railroad's service. The proposed substituted service will not introduce a third and additional type of service but will, on the contrary, take the place of the rail service to a certain extent, and will simply constitute a new and improved method whereby the railroad will supply its service. So far from destroying or restraining competition between the railroad's service and the service provided by the independent motor carriers, the proposed substituted service, by improving the railroad's service from the standpoint of the shipper and increasing the economy and efficiency of operations from the railroad's standpoint, will help to preserve healthy competition between the railroad's service and the service of the existing independent motor carriers. Moreover, it must be remembered that the primary objective of the national transportation policy, as formally declared by Congress, since the Transportation Act of 1920, is the development, coordination and preservation of an adequate national transportation system, through the promotion of efficiency and economy and the fostering of sound economic conditions in transportation. The promotion of economy and efficiency and of improvement of service within a railroad system, for the maintenance of sound economic conditions within that system and the preservation of that

system as an important part of the national transportation system, is an important step in the attainment of the Congressional objective, and it is plainly within the sound administrative discretion of the Commission to approve proposals directed to that end, in its carrying out of the declared transportation policy of Congress.

Clearly, the Commission, in permitting a railroad to improve its service to the public and increase the economy and efficiency of its operations by the substitution of motor for rail handling of less-than-carload traffic between local way stations on its rail line, is not only not contravening the policy and provisions of the Interstate Commerce Act, but, on the contrary, is actively furthering and carrying out the Congressional policy, within the provisions of the Act, by permitting and encouraging advancement in the transportation art, to the public advantage (see brief of Willett Company and The Pennsylvania Railroad Company previously filed herein, pp. 71-79).

State Court Decisions Do not Support Protestants' Position but, on the Contrary, are in Accord with the Commission's Policy of Permitting Substituted Service in Cases of this Character.

Before leaving this discussion of the protestants' contention with respect to the proper interpretation and application to be given to the statutory standards by which the Commission is to be guided in these cases, it should be pointed out that the reliance which protestants place upon the decisions of state courts, in support of their contention as to the meaning of the phrase "public convenience and necessity" (see pp. 79-84 of brief of appellee Parker), is unfounded, since none of the state decisions referred to by protestants deals with a case involving substituted service, with the exception only of the decision of the Ohio Supreme Court in *New York Central R. Co. v. Public Utility Commission*, 123 Ohio St. 370, 175

N. E. 596 (1931). In the Ohio case, the Ohio Supreme Court had before it a decision of the Ohio Commission in which an application by a railroad to engage in substituted service had been denied. This exercise of administrative discretion by the Ohio Commission was sustained by the Ohio Supreme Court. However, since that time, the Ohio Commission has changed its attitude toward substituted service and in a more recent decision has granted permission to a railroad-controlled subsidiary to engage in such substituted service. An appeal from this later decision of the Ohio Commission was taken to the Ohio Supreme Court, and that Court has, within the last few weeks, handed down a decision sustaining the Commission's grant of authority to engage in such substituted service.* A copy of this recent opinion of the Ohio Supreme Court, handed down March 14, 1945, is reproduced as an appendix to this brief.

Thus, the only state court decision to which protestants can point as supporting their position with respect to substituted service no longer represents the attitude or the law of that state toward substituted service. In contrast to this lack of support in the state courts for protestants' position, there are, in support of the positions of the Willett Company and The Pennsylvania Railroad Company, not only the recent Ohio decision but also the Iowa and South Dakota decisions, cited in the brief previously filed herein (pp. 56-59 of brief of Willett Company and The Pennsylvania Railroad Company), and in addition:

* In this recent decision the Ohio Supreme Court relied in part on a statutory provision which had been enacted by the Ohio legislature subsequent to the earlier decision of the Ohio court, and which provided that a railroad might acquire and enter into working arrangements with a motor carrier. This Ohio statute, upon which the Ohio court partially relied in approving the performance of substituted service by the railroad's motor carrier subsidiary, is analogous to the provisions of Section 213 (a) of the Motor Carrier Act (now included in Sec. 5 of the Interstate Commerce Act), permitting acquisition by a railroad of a motor carrier with the Commission's approval (see pp. 25-26 of brief of Willett Company and Pennsylvania Railroad Company).

decisions of the highest courts of Florida, Texas, and Washington: *Central Truck Lines v. Railroad Commission*, 118 Fla. 526, 160 So. 22 (1935); *Webster v. Texas & Pac. Motor Transp. Co.*, 159 S. W. (2d) 902 (Tex.) (1941); *South Bend Stage Line v. Dept. of Public Works*, 162 Wash. 46, 297 Pac. 780 (1931). Wherever the state courts have passed on the question of the propriety of substituted service of the kind here proposed, they have decided in its favor. The same is true of the state regulatory commissions, which have generally permitted the establishment of substituted service by railroads or their motor carrier subsidiaries.*

C. The Contention of Appellee-Protestants, that Congress Intended to Exclude Railroads from the Motor Carrier Field, as Marked out by the Motor Carrier Act, is Refuted by the Plain Provisions of the Act and Their Legislative History, and by the Decision of this Court in the Thomson Case.

The second principal contention advanced by the appellee-protestants is that the policy which the Commission has established in dealing with substituted service cases, and which it has applied in the present case, is unlawful because it ignores an alleged intent on the part of Congress that the railroads should be entirely excluded from the motor carrier field, at least to the extent that that field is marked out and regulated by the Motor Carrier Act, or admitted to that field only under rare and special circumstances, and that railroads should be discouraged from engaging in motor carrier operations within the scope of the Motor Carrier Act and should be restricted primarily to motor carrier operations subject to Part I of the Interstate Commerce Act, *e. g.*, pick-up-and-

*Permission has been granted to motor carrier subsidiaries of The Pennsylvania Railroad Company to operate for it in substituted service over intrastate routes by the state commissions of New York, Pennsylvania, Ohio, Indiana, and Maryland, and no state commission has refused such permission.

delivery and terminal operations (see pp. 41-46 of brief of appellee Parker, and p. 19 of brief of appellee Norwalk Truck Line Co.). The reason which is advanced for this supposed intent on the part of Congress is that Congress was allegedly afraid that the railroads if allowed to invade the motor carrier field would take advantage of that opportunity in order to destroy competition from independent motor carriers.

The answer to this contention is, first, that the provisions of the Act and the decisions of this Court make it plain that Congress had no such intent to exclude the railroads from the motor carrier field, and second, that the Commission, in the disposition which it has made of applications by railroads or motor carrier subsidiaries of railroads to engage in motor vehicle operations, has as a settled matter of its own policy taken pains to restrict railroad operations in the motor carrier field to operations which are auxiliary to and supplemental of the railroad's own operations and to prevent the railroad from engaging in general over-the-road trucking in competition with independent motor carriers.

1. THE PROVISIONS OF THE MOTOR CARRIER ACT AND THE THOMSON DECISION DEMONSTRATE THAT CONGRESS DID NOT INTEND TO EXCLUDE RAILROADS FROM THE MOTOR CARRIER FIELD, AS MARKED OUT BY THAT ACT.

The clearest demonstration that Congress did not intend to exclude the railroads from the motor carrier field, as defined and marked out by the Motor Carrier Act, is provided by the provisions of the Motor Carrier Act itself. Protestants claim that Congress in enacting the Motor Carrier Act intended thereby to carve out a field, defined by the scope of regulation of that Act, from which the railroads should be excluded except in rare and special instances. But if that were so, what possible significance could be given to the provision in the declaration of policy embodied in Section 202(a), as originally enacted by the

Motor Carrier Act, that the policy of Congress was thereby declared to be to "improve the relations between, and coordinate transportation by and regulation of, motor carriers *and other carriers*?" (See appendix to brief of the Willett Company and The Pennsylvania Railroad Company, p. 1a.) And what possible significance could be given to the provisions contained in Section 213(a), as originally enacted by the Motor Carrier Act, to the effect that a carrier other than a motor carrier, *e. g.*, a railroad, might be permitted by the Commission to acquire control of a motor carrier if the Commission found that the transaction proposed would promote the public interest by enabling such other carrier "to use service by motor vehicle to public advantage in its operations"? (See appendix to brief of the Willett Company and The Pennsylvania Railroad Company, p. 5a.)

Plainly, these provisions contemplate that there shall be, within the field marked out by the Motor Carrier Act, coordinated operations involving both rail and motor carriers, and more specifically, that a railroad shall be permitted to enter that field and actually operate motor vehicles, where the Commission finds that the railroad will thereby be enabled to use such motor vehicles in its own operations to public advantage. As pointed out in the brief of the Willett Company and The Pennsylvania Railroad Company previously filed herein (pp. 27-29, 73-75), the legislative history of the Motor Carrier Act shows that it was expressly contemplated, by Commissioner Eastman, both as Commissioner and as Federal Coordinator, and by the Senate and House Committees which considered the legislation, that railroads would wish to acquire motor carriers and engage in motor vehicle operations for the explicit purpose of performing substituted service of the kind involved in this case, and that it would be in the public interest for them to be permitted, to do so, under appropriate conditions, and it is clear from that legislative history that the provisions referred to were included

in the Act for the purpose of making it possible for railroads to engage in motor vehicle operations of exactly the kind here involved. There could be no plainer indication that Congress was entirely willing that railroads should be permitted to enter the motor carrier field, as marked out by the Motor Carrier Act, at least to the extent of engaging in such substituted service operations.

For example, Commissioner Eastman, in testifying with respect to these provisions before the House Subcommittee, and specifically with respect to substituted service, said:

"I hope and expect to see the railroads utilize these motor vehicles in their own operations *to a much greater extent than they now do.* * * * They are utilizing motor vehicles in their terminal operations and *they have used them as a substitute for way freight service, in some cases.* My own view is that there will be found *many more ways* where they can be used to advantage in combination with railroad service and *I hope to see the time when the railroads will utilize these opportunities fully.*" (Emphasis supplied.) (See Brief of Willett Company and Pennsylvania Railroad Company, pp. 27-28.)

And before the Senate Committee Commissioner Eastman said:

"My own personal opinion is that the railroads are going *more and more* to find that they can use trucks and busses to advantage in connection with their own service." (Emphasis supplied.) (See Brief of Willett Company and Pennsylvania Railroad Company, p. 28.)

Plainly, these statements by Commissioner Eastman contemplate that the use by railroads of motor vehicles in their own railroad operations, and specifically in sub-

stituted service operations, should not only be permitted but should be allowed to grow and expand to the fullest extent possible.

That Congress did not intend to discourage the entry of the railroads into the motor carrier field, as marked out by the Motor Carrier Act, in appropriate circumstances, as for example, in substituted service operations, is also made plain by the decision of this Court in the *Thomson* case. This Court specifically held in that case that a railroad might properly obtain permission to engage in motor vehicle operations, and more particularly in substituted service operations, under the provisions of the Motor Carrier Act. (See pp. 55-56 of brief of Willett Company and Pennsylvania Railroad Company.) There, as here, the motor vehicle operations in which the railroad proposed to engage constituted "an integral and essential part of this service tendered by the railroad," and accordingly it was held proper for the railroad to apply for and acquire the operating certificate required by the Motor Carrier Act for engagement in motor vehicle operations.

Moreover, the plain implication of Mr. Justice Murphy's opinion in that case is that, since the proposed substituted service is simply a "new method of carrying on part of [the railroad's] all-rail freight business in which it has been engaged for many years," the railroad should be permitted to extend such substituted service to any portion of its all-rail less-than-carload service, upon an appropriate showing and subject to appropriate conditions as determined by the Commission. As stated by Mr. Justice Murphy in that case, the proposed substituted service operations "are the operations offered by the railroad as component parts, not as separate or distinct segments, of its single service. They may be replaced or eliminated at the sole discretion of the railroad." (Emphasis supplied.) (See brief of Willett Company and Pennsylvania Railroad Company, pp. 55-56.)

It clearly follows, therefore, from these considerations

that Congress had no such intent as the protestants seek to impute to it, i. e., to exclude or discourage railroads from entry into the motor carrier field, as marked out by the Motor Carrier Act.

2. THE GROUND ADVANCED BY THE PROTESTANTS FOR THE CLAIMED EXCLUSION OF RAILROADS FROM THE MOTOR CARRIER FIELD, VIZ., THE SUPPOSED DANGER TO THE EXISTENCE OF INDEPENDENT MOTOR CARRIERS, IS REMOVED BY THE COMMISSION'S POLICY OF RESTRICTING RAILROAD OPERATIONS IN THAT FIELD SO AS TO GUARD AGAINST ANY SUCH DANGER.

The second answer to this claim of protestants for the exclusion of railroads from the motor carrier field is that the supposed danger which protestants attribute to the entry of railroads into the motor carrier field, and which they allege as the reason for the supposed intent of Congress—found above to be non-existent—to exclude the railroads from this field, is completely met by the Commission's established policy for handling applications by railroads or motor carrier subsidiaries of railroads, to engage in motor carrier operations.

The danger which protestants profess to fear as the result of the entry of railroads into the motor carrier field is that the railroads will thereby be placed in a position in which they can engage in general over-the-road trucking in competition with independent motor carriers, and, by ruinously competitive practices, drive the independent motor carriers out of business. To the extent that any such danger may exist or may have existed, it has been fully recognized and taken into consideration by the Commission, and, as a safeguard against it, the Commission has adopted, as its settled policy, what is known as the "Barker doctrine," whereby it will not permit a railroad or a motor carrier subsidiary of a railroad to engage in general over-the-road trucking. This doctrine was established by the Commission in the

so-called "*Barker*" case in the early days of the Commission's administration of the Motor Carrier Act, and it has been rigidly and consistently adhered to by the Commission since that time. (See brief of Willett Company and Pennsylvania Railroad Company, pp. 37-39.)

In furtherance of this settled policy, the Commission has in all substituted service cases attached to its grant of approval conditions designed to insure that the motor vehicle operations permitted will be limited to the proposed substituted service, and will consist only of operations that are auxiliary to and supplemental of the railroad's own operations. These conditions have been evolved by the Commission after extended consideration in a series of substituted service proceeds. In addition to the general condition that the substituted service must be auxiliary to and supplemental of the railroad's operations, and the condition that it must be restricted to stations on a rail line of the railroad, the Commission in its early development of these conditions attached the condition that the substituted service should be limited to the handling of shipments which received a prior or subsequent rail haul. Later, the Commission became convinced, principally through the influence of Commissioner Eastman, that the condition requiring a prior or subsequent rail haul operated largely to defeat the operating advantages which were expected to be derived from substituted service, because that condition made it necessary for the railroad to continue to operate its peddler-car service for handling local less-than-carload freight to, from and between intermediate stations, and therefore prevented the achievement of the desired operating economies. Accordingly, the Commission evolved, in Commissioner Eastman's opinion in the second *Kansas City S. Transport Co.* case, its so-called "key-point" doctrine, whereby the requirement of a prior or subsequent rail haul was eliminated and there was substituted in its place the requirement that shipments moving between certain key points

should not be handled in the proposed substituted service because the handling of such shipments would amount to permitting the motor carrier subsidiary of the railroad to engage in through over-the-road trucking. The development and significance of these conditions have been fully discussed in the brief previously filed herein by the Willett Company and The Pennsylvania Railroad Company (see pp. 44-49).

3. THE RESTRICTIVE CONDITIONS ATTACHED BY THE COMMISSION TO ITS GRANTS OF APPROVAL IN SUBSTITUTED SERVICE CASES ARE ADAPTED BY THE COMMISSION TO THE CIRCUMSTANCES OF EACH CASE, AND ARE IN THE PRESENT CASE ADEQUATE TO PROTECT THE INDEPENDENT MOTOR CARRIERS.

It is claimed by the protestants that these restrictive conditions are not adequate to protect the independent motor carriers against general over-the-road competition from the railroad's motor carrier subsidiary. (See brief of appellee Norwalk Truck Line Co., pp. 23-26.) But surely, such a claim must be addressed to the administrative discretion of the Commission. The question of what restrictive conditions are necessary to prevent the railroad's motor carrier subsidiary from engaging in general over-the-road trucking in competition with independent motor carriers, and how those conditions actually work out in practice, is one which can be determined only in the light of the expert knowledge and experience of the Commission in handling practical operations in this field. The Commission carefully considers the circumstances of each case, and determines in the light of those circumstances and of its experience in handling these cases just what particular conditions would be best designed to prevent the railroad's motor carrier subsidiary from engaging in general over-the-road trucking. In some cases it employs the key-point doctrine, and in other cases it attaches the condition requiring a prior or subsequent rail haul, according to its best judgment as to what is most appro-

appropriate under the circumstances of the particular case. The fact of the matter is that the key-point doctrine, of which protestants complain, is more likely to safeguard the independent motor carriers than is the condition requiring a prior or subsequent rail haul. This is because by far the ~~greatest~~ portion of the traffic handled in substituted service actually receives a prior or subsequent rail haul, regardless of whether or not such a condition is attached, and the key-point condition has the added effect of limiting the length of the hauls in substituted service and depriving the motor carrier engaged in substituted service from handling some of the longer hauls that it would otherwise be able to handle. Thus the substitution of the key-point restriction for the prior-or-subsequent-rail-haul restriction has the effect of substantially retaining the benefit of the latter for the independent motor carriers, since almost all of the traffic involved complies with that condition anyway, and, in addition, of imposing another condition which further limits the substituted service operations by eliminating hauls between the key points.

In the present case, the Commission has expressly found, in view of the special character of the substituted service and the conditions and limitations to which it is made subject, that "It does not appear that the restricted service would be directly competitive or unduly prejudicial to the operations of any other motor carriers" (R. 11). Furthermore, the Commission, for the purpose of insuring that the substituted service operations of the Willét Company shall not exceed the limits of service which is auxiliary to or supplemental of rail service, has expressly retained control of the case, by specifying that its grant of approval shall be subject to "such further specific conditions as we, in the future, may find it necessary to impose in order to restrict applicant's operations to service which is auxiliary to, or supplemental of, rail service" (R. 12). Plainly, the protestants are fully protected by the opportunity which is thus provided them to

complain to and obtain relief from the Commission at any time, if they should find that the actual substituted service operations of the Willett Company exceed the proper bounds of such substituted service and encroach into the field of general over-the-road trucking. So far as the Willett Company and The Pennsylvania Railroad Company are concerned, there is no desire or attempt whatever on their part to engage in any such general over-the-road trucking. The protestants' problem in this respect is obviously one of enforcement, for handling under the Commission's enforcement powers, and is not a problem of legal determination for this Court.

D. The Contention of Appellee-Protestants that the Application in this Case Should Have Been Made by the Railroad Rather than by its Motor Carrier Subsidiary, and the Contention that it Should Have Been in the Form of an Application for a Contract Carrier Permit Rather than for a Common Carrier Certificate, Are Negatived by the Law and the Decisions.

Another contention advanced by appellee-protestants is that, in view of this Court's decision in the *Thomson* case, and in view of the fact that it is the railroad and not its motor carrier subsidiary which deals with shippers and issues the bills of lading under which shipments will move in the proposed substituted service, the application for the certificate should have been made by the railroad and not by the Willett Company. In conjunction with this argument, it is contended that the Willett Company should have applied for a contract carrier permit, rather than a common carrier certificate, since its operations will be limited to service for the railroad, under a contract with it, and will not be performed for the general public. (See brief of appellee Norwalk Truck Line Co., pp. 11-14.)

19 THE CONTENTION THAT THE APPLICATION SHOULD HAVE BEEN MADE BY THE RAILROAD RATHER THAN BY ITS MOTOR CARRIER SUBSIDIARY IS UNFOUNDED.

The *Thomson* case did not decide that an application of the kind here involved may not be made by a motor carrier subsidiary of a railroad. All that was decided in the *Thomson* case was that it was erroneous for the Commission to refuse to permit a railroad to apply for and obtain a certificate to engage in motor vehicle operations in substituted service. Under the decision in that case, it was left open for either a railroad or its motor carrier subsidiary to make the application. In the instant case the application was made by the motor carrier subsidiary, and the railroad intervened in support of the application, so that both the railroad and the motor carrier subsidiary were before the Commission and are now before the Court. It can make no substantial difference, from the standpoint of administration of the act, whether the application is made by the railroad and joined in or supported by its motor carrier subsidiary, or is made by the subsidiary and is joined in or supported by the railroad. If, for reasons of business management, it is desirable for the railroad to retain the separate business organization and separate facilities of its motor carrier subsidiary, then the logical and sensible procedure would seem to be for the application to be made by the subsidiary, which owns the tracks and would actually perform the operation, and to be supported by the railroad for which the subsidiary will operate, as was done here.

The advancement of this argument by the protestants can hardly be considered to be in good faith. It can make no possible difference to them whether the application for permission to engage in the proposed service is made by the railroad or by its subsidiary. In the *Thomson* case, the issue as to whether or not the railroad should be per-

mitted to apply for and obtain a certificate was, of course, a vital issue, since the railroad had made the application and was denied the certificate by the Commission solely on the ground that it was not the proper applicant. Here it is not an important issue, or any issue, as to whether the application should have been made by the railroad rather than by its subsidiary, since both parties are before the Commission and the Court. In any event, the question whether the original application should have been in the name of the railroad or its subsidiary is a purely technical one, having no bearing on the ultimate outcome of the proceeding. A holding that the application should have been made by the railroad would not in any respect give the protestants the relief which they seek, and would serve no useful purpose from their standpoint, except perhaps to delay the inauguration of the service.

2. THE CONTENTION THAT THE APPLICATION SHOULD HAVE BEEN IN THE FORM OF AN APPLICATION FOR A CONTRACT CARRIER PERMIT RATHER THAN FOR A COMMON CARRIER CERTIFICATE IS UNFOUNDED.

Similarly, the contention that the Willett Company should have applied for a permit as a contract carrier rather than for an operating certificate as a common carrier is open to the charge of not having been made in good faith, because it can be of no possible concern to the appellee-protestants whether the permission to engage in this substituted service is in the form of a contract carrier permit or a common carrier certificate. Applications for permission to engage in substituted service have been in the form of common carrier applications since the decision of the Commission in *Substituted Freight Service, Ex Parte No. 129*, 232 I. C. C. 683 (1939). There the Commission, in investigating certain problems with respect to the regulation of substituted service, specifically considered the question whether or not an application for

permission to engage in such service should be for a contract carrier permit or for a common carrier certificate. The Commission concluded that, from the standpoint of the public, the transportation service offered was undoubtedly common carrier service available to the general public, and that either the rail carrier or the motor carrier performing the service for the rail carrier would have to have authority to engage in common carriage by motor vehicle. In this connection, the Commission said (pp. 687-88 of 232 I. C. C.):

"There can be no doubt that the interstate transportation service here under consideration is common-carrier service and that either the rail carrier must have authority to engage in common carriage by motor vehicle in its own right, or the motor carriers joining in such service must be authorized to act as such carriers in their individual capacities. In either event, where the substitution service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated. Under the act and our regulations thereunder, it is fundamental that the service covered by published rates, the routes over which it is performed, and the names of the carriers performing the service must be set forth definitely in the governing tariffs for the information of the shipping public, interested carriers, and the regulatory body, in order to insure the effective and fair administration of the act."

The Commission thus held that, since the motor vehicle service in question would be available to the general public for the handling of shipments between the points and over the routes authorized, there would have to be outstanding, in the name of either the railroad or the motor carrier performing service for the railroad, a

certificate permitting common carriage by motor vehicle between the specified points and over the defined routes, so that the service in question would be brought within the scope of regulation of the Motor Carrier Act.* The fact that the physical operations performed by the motor carrier engaging in substituted service are performed only for the railroad under contract with it does not alter the basic nature of the over-all service, as a service which is offered to the public generally for the transportation of shipments between the points and over the routes authorized and which is therefore a common carrier service. The important thing, from the standpoint of administration of the Act, is that there shall be an outstanding common carrier certificate covering the service. Whether the certificate is in the name of the railroad, or of the motor carrier subsidiary, is not of any practical importance to anyone except the railroad and its subsidiary.

The Commission has thus established a settled practice of requiring that an application for permission to engage in substituted service shall be in the form of a common carrier application. This practice has been settled since its decision in the *Substituted Freight Service* case in 1939, and therefore is a practice of six years standing. If it should now be held that this practice is erroneous, and that all such applications should have been in the form of contract carrier permits, the result would be to introduce chaos into this particular field of motor carrier operations. The result would also be to weaken

*The principle thus established by the Commission in the *Substituted Freight Service* case was specifically applied by the Commission to the Willett Company of Indiana, applicant in the present case, in the proceeding in which the Willett Company first applied to the Commission for permission to engage in substituted service: *Willett Company of Indiana, Inc., Extension-Ill., Ind., and Ky.*, 21 M. C. C. 405 (1940). There the Commission, after reviewing briefly the character of the operations proposed, said (p. 407 of 21 M. C. C.): "Such motor vehicle operations are those of a common carrier by motor vehicle, subject to the Motor Carrier Act, 1935. *Substituted Freight Service*, 232 I. C. C. 683."

and reduce the scope of the Commission's regulatory rights with respect to this field, since the Commission's powers of regulation with respect to common carrier operations are broader and more extensive than those which it has with respect to contract carrier operations. If the Court should agree with protestants on this issue and should hold that the application should have been for a contract carrier permit, then protestants in future cases would be deprived of the opportunity of making the arguments which they have here made regarding the meaning of the phrase "public convenience and necessity", because applications for contract carrier permits are not subject to any requirement as to public convenience and necessity (see Sec. 209 of Interstate Commerce Act, 54 Stat. 919, 49 U. S. C. Sec. 309).

E. The Contention of Appellee-Protestants that, in View of this Court's Decision in the Seatrain case, the Commission Must be Regarded as Having the Power to Compel Joint Rates and Coordinated Operations between Rail and Motor Carriers, Ignores the Reasoning of the Seatrain Decision and Disregards the Applicable Provisions of the Act.

A novel contention, based on the recent decision of this Court in *United States v. Pennsylvania R. R. Co.*,

U. S. , 65 S. Ct. 471 (January 29, 1945), the so-called "Seatrain" case, is advanced by appellee Norwalk Truck Line Company in its brief in the present case (pp. 20-22). It is there contended that the Commission is wrong in believing that it has no authority to compel joint rates and coordinated operations between rail and motor carriers. The argument is that the Commission does have that power and that it should exercise that power to compel the railroad to employ the existing motor carriers for the performance of the proposed substituted service.

The argument that the Commission is empowered

by the Interstate Commerce Act to compel joint rates and coordinated operations between rail and motor carriers purports to be based on the reasoning of Mr. Justice Black in holding, in the Seatrain case, that the Commission was correct in concluding that it had authority to compel railroads to interchange their cars with Seatrain, a water carrier. But there is no analogy between the two types of situations, and Mr. Justice Black's reasoning in the Seatrain case has no application to the present case. In the Seatrain case, the question was whether or not the railroads could be compelled by the Commission to deliver their cars to a water carrier subject to Part III of the Interstate Commerce Act, viz., Seatrain. Mr. Justice Black, speaking for this Court, reasoned that, since the railroads were under a duty, under Section 1(4) of the Act, to establish through routes with water carriers, and were also under a duty, under Section 3(4) of the Act, to afford all reasonable facilities for the interchange of traffic between their lines and connecting lines, including connecting water carriers, and since Section 15(3) vested in the Commission the power to compel the establishment of through routes between rail and water carriers and the terms and conditions thereof, it followed that the Commission, having previously established such through routes with Seatrain, had the power to compel railroads to deliver their cars to Seatrain, a connecting water carrier, for the interchange of traffic. His conclusion was summed up as follows (p. 475 of 65 S. Ct.):

"It was from its power to require through routes that the Commission originally derived its power to require interchange of railroad cars among connecting railroads. Since a rail-water through route with Seatrain cannot function without an interchange of cars, the unquestioned power of the Commission to require establishment of such routes would be wholly fruitless, without the corollary power to abrogate the Association's rule which prohibits the interchange."

Thus, the proper exercise of a power which was specifically vested by the Act in the Commission was found to entail an implied power in the Commission, viz., the power to require interchange of cars.

No such situation is presented in the instant case. There is no question here of interchange of equipment between connecting carriers. The performance of substituted service for the railroad by independent motor carriers would require either a contract between the railroad and such motor carriers or the formulation and publication of joint rates by the railroad and the motor carriers; and the Commission has no power to compel either such a contract or such joint rates. Section 216(c) of the Act provides that "common carriers of property by motor vehicle *may* establish reasonable through routes and joint rates, charges, and classifications with other such carriers, or with common carriers by railroad," but there is no provision in the Act whereby the Commission is either expressly or by implication empowered to compel such joint rates. The Commission has thus correctly observed in these substituted service cases that any arrangement between the railroad and independent motor carriers for this substituted service would necessarily depend on the voluntary cooperation of the motor carriers as well as the railroad, and it has, therefore, not erred in stating this as one of the reasons for concluding that improved service to the public would be more likely to result from an arrangement whereby the substituted service is performed by the railroad itself or its motor carrier subsidiary, "properly synchronized under a single management," than would be the case if it were dependent on the voluntary cooperation of competing independent motor carriers.

IV. CONCLUSION.

It is apparent from all these contentions advanced by appellee-protestants that they are endeavoring to create the impression that in this case and other cases of like character the Commission's policy with respect to substituted service amounts to an attack upon the interests of independent motor carriers and is designed to injure those interests. Any such impression would be wholly false, and could be obtained only by ignoring what the Commission has said and what it actually does with respect to this type of service. So far from constituting an attack on the interests of independent motor carriers, the policy which the Commission has established and has applied in this and other substituted service cases is designed to safeguard those interests. It has been and is a principal concern of the Commission in these cases to adopt and enforce such restrictive conditions as will insure that the railroads do not overstep the bounds of motor vehicle operations auxiliary to and within the sphere of their own railroad operations. This is plainly apparent from the Commission's application of its "Barker" doctrine in these substituted cases and its insistence on attaching restrictive conditions, of the kind previously discussed, and on retaining control for enforcement of those conditions. (See pp. 39, 44-47 of brief of Willett Company and Pennsylvania Railroad Company, and pp. 24-28 above.)

Protestants, in their attempt to create the impression that the Commission is attacking rather than safeguarding the interests of independent motor carriers in its handling of substituted service cases, refer to two recent decisions of this Court, *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475 (1942), and *Eastern-Central Ass'n. v. U. S.*, 321 U. S. 194 (1944). But neither of those decisions has any application to the present case. They are cited by protestants for the general proposition that the courts will


reverse a Commission determination for failure properly to apply statutory standards, or for lack of sufficient findings or evidence to support its findings. This general proposition is, of course, not subject to dispute. Apart from such support as those cases lend to that general proposition, they have no bearing on any of the issues involved here. In the *Carolina Carriers Corp.* case, the Commission, in granting to a motor carrier a certificate under the "grandfather" clause, had restricted the carrier's operating rights to certain specific commodities which it had actually hauled prior to the "grandfather" date, and had also imposed certain geographical restrictions. This Court concluded that the Commission had not shown that, in thus excluding the carrier from the handling of commodities which it had not actually handled prior to the "grandfather" date but which were of the same class as those which it had then handled, and in imposing the geographical limitations which it did, it had applied the proper statutory criterion. The Court accordingly sent the case back to the Commission for more specific findings, to enable the Court to determine whether it had applied the proper criterion.

In the *Eastern-Central* case, the Commission had found that certain volume minimum weights published by motor carriers in connection with their freight rates were unlawful, because the handling costs of the traffic at those weights had not been shown to be less than the costs incurred for handling reasonable truck-load minimum weights. This Court held that it was erroneous for the Commission to consider only the factor of reduction in operating costs in passing upon the lawfulness of the proposed volume weights, and that the Commission should also have taken into account the factor of competition and especially the competitive relations between the proposed motor carrier rates and minimum weights on the one hand, and the comparable rail rates and minimum weights on the other hand. The Court therefore returned

the case to the Commission for a further weighing of the facts, in the light of the standards held by the Court to be properly applicable.

Obviously, no question with respect to the Commission's policy for handling substituted service cases was even remotely involved in either the *Carolina Carriers* case or the *Eastern-Central* case, and therefore neither of those cases has any bearing on the issues involved in the present cases. The fact that this Court has in two cases overruled the Commission for the benefit of motor carriers does not mean that it should or will do so in every case involving Commission action with respect to motor vehicle operations. To the extent that the *Eastern-Central* decision suggests the importance of the maintenance of competitive conditions between rail transportation, on the one hand, and motor transportation, on the other, it supports the Commission's decision rather than the protestants' position, because the approval of the proposed substituted service will make possible the preservation of healthy competition, between the railroad and independent motor carriers, which otherwise would not be possible. (See brief of Willett Company and Pennsylvania Railroad Company, pp. 53-54, 78-79, and see p. 16 above.)

In the *Eastern-Central* case the Court pointed out that it did not question "the Commission's authority to adopt and apply general policies appropriate to particular classes of cases, so long as they are consistent with the statutory standards which govern its action" (p. 211 of 321 U. S.). In the instant case, the statutory standard which governs the Commission's action is that of public convenience and necessity. As previously shown, this standard, which is not explicitly defined in the Act, must be construed as the Commission has in fact construed it, viz., in the light of other provisions of the Act, and particularly its policy provisions. Construed in the light of those provisions, and in the light of the legislative history of those provisions, especially the legislative



history which deals expressly with the problem of substituted service, the Commission's action in this case is clearly in accord with the statutory standard.

Thus it is plain from the various contentions advanced by the appellee-protestants that the provisions of the Interstate Commerce Act and the Congressional policy declared therein are ranged in opposition to rather than in support of the protestants. The inevitable result of their position would be that progress in the art of transportation would be impeded rather than advanced, and the *status quo* would be frozen to prevent the development and growth of this new and improved form of transportation service which the public needs and desires, which was favored by Commissioner Eastman and the Congressional Committees at the time of the enactment of the Motor Carrier Act, and which has met with the practically universal support and approval of the state courts and commissions that have had occasion to consider it, as well as of the Interstate Commerce Commission.

What the protestants definitely want is a situation in which they can gradually drive the railroads out of the less-than-carload local way freight business, by compelling them to continue the old costly and inefficient peddler-car method of handling such business. Protestants' position is on the side of the destruction of competition, rather than the maintenance of it.

On the other hand, the maintenance of the Commission's established policy with respect to these substituted service cases, especially as applied in the present case, will result in the fostering of healthy and vigorous competition, between the railroads' service, including substituted service as one of its instrumentalities, on the one hand, and the service of the independent motor carriers, on the other. There can be no doubt that it is the latter

viewpoint which has the support of the policy and provisions of the Interstate Commerce Act.

Respectfully submitted,

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MARCH 24, 1945.

APPENDIX.

Supreme Court of Ohio.

THE CLEVELAND, COLUMBUS & CINCINNATH HIGHWAY, INC.,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF OHIO, *Appellee.*

INTERNATIONAL MOTOR FREIGHT CO. ET AL., *Appellants,*

v.

PUBLIC UTILITIES COMMISSION OF OHIO, *Appellee.*

Decided March 14, 1945.

WEYGANDT, C. J. The first question presented by the appellants for consideration by this court is whether the proposed operation of the Pennsylvania Truck Lines, Inc., is that of a "motor transportation company" or "common carrier by motor vehicle" as defined by Section 614-84 (a), General Code, which reads in part as follows:

"The term 'motor transportation company,' or 'common carrier by motor vehicle,' when used in this chapter, shall include, and * * * shall apply to every corporation, company, * * * or copartnership * * * when engaged, or proposing to engage, in the business of transporting persons or property, or both, or of providing or furnishing such transportation service, for hire, whether directly or by lease or other arrangement, for the public in general, in or by motor propelled vehicles of any kind whatsoever, * * * over any public highway in this state * * *"

The applicant, the Pennsylvania Truck Lines, Inc., has entered into a contract with The Pennsylvania Rail-

road Company which also owns the stock of the former company. This contract is unassignable except with the consent of the railroad company and provides that the trucking company as an independent contractor shall accept and transport from and to the enumerated stations all so-called less-than-carload quantities of freight offered to it by the railroad company. The motor vehicles employed in this transportation service are owned by the trucking company and are not to be rented or leased to the railroad company but are to be operated, maintained and insured by the trucking company at its own expense. For this service the railroad company agrees to pay the trucking company a specified sum per month plus an additional amount for mileage traveled. The contract "shall continue in effect subject to termination upon thirty (30) days' written notice from either party to the other; provided, that either party may terminate this agreement at any time immediately upon written notice to the other party by reason of any adverse legislation, order or rule of any public authority; and provided further, that railroad, because of its common carrier obligations, may terminate this agreement at any time immediately upon the giving of written notice to trucker in the event that trucker shall fail to perform in a satisfactory manner any of its obligations under this agreement."

In their briefs counsel cite and discuss at length the decisions of this court in the three case of *New York Central Rd. Co. v. Public Utilities Commission*, 121 Ohio St., 588, 170 N. E., 574; *New York Central Rd. Co. v. Public Utilities Commi sion*, 123 Ohio St., 370, 175 N. E., 596; and *Lake Motor Freight Lines, Inc., v. Public Utilities Commisison*, 126 Ohio St., 419, 185 N. E., 529.

In the second paragraph of the syllabus of the first of the three cited cases this court held that where "a common carrier railroad company owns, controls, operates or

manages any motor-propelled vehicle not usually operated on or over rails, used in the business of transportation of persons or property or both as a common carrier for hire over any public highway in this state, this constitutes such railroad company a motor transportation company." In contrast the instant case involves the certification of a trucking company and not a railroad. It is true that in the cited case a trucking company was doing the hauling, but that company was operating under a contract which lodged complete control of both management and operation in the railroad company alone. In the instant case the contract expressly provides that the trucking company shall be "wholly independent" and that the railroad company shall not "supervise, direct or control the manner of the rendering of any service in connection with any work or other feature covered by this or prior agreements • • •"

The second cited case involved the same railroad company as the first. The chief difference between the two cases is that in the first it was held simply that the railroad company could not continue to operate the trucking service without a certificate of convenience and necessity; and in the second case the railroad company itself applied for such a certificate but this was denied on the three grounds that no proper tariffs had been filed by the applicant as required by law and the rules and regulations of the commission, that the evidence did not show public convenience and necessity for the proposed service, and that the evidence did not show the existing motor transportation companies were not rendering adequate and convenient service.

The third cited case is the one upon which the appellee relies. There, as in the instant case, the applicant was a trucking company that had entered into a contract with the railroad company for motor transportation of less-than-carload quantities of freight from and to the latter's

stations and under the latter's tariffs and bills of lading exclusively. The Public Utilities Commission granted the application, and that order was affirmed by this court by a divided vote.

But it is important to observe that subsequent to the decisions in those cases Section 8746-1, General Code, was enacted. In part it reads as follows:

"Any railroad company may acquire, own and hold capital stock and securities of corporations organized for or engaged in the businesses authorized in this act and may operate the properties, or any part or parts thereof, of such corporations, and may enter into working arrangements and agreements with such corporations."

Thus it is apparent that this new statute has expressly authorized a railroad company to do the things that have been done by The Pennsylvania Railroad Company, namely, own capital stock of a motor transportation company and enter into a working arrangement and agreement with such corporation; and there is nothing in the statute to indicate an intention on the part of the General Assembly to the effect that under such circumstances the railroad necessarily becomes a motor transportation company or that the contracting motor transportation company thereby loses its character as a common carrier, as contended by the appellants. It, of course, is true that the motor transportation company is hauling for the railroad, but the fact remains that at the same time it is engaged in public transportation also. The freight transported is the property of neither the railroad company nor the motor transportation company but belongs to members of the public by whom it is taken to one of the enumerated stations to be hauled to another.

Incidentally, as stated by the Public Utilities Commission, one of the appellant protestants itself has been operating for some time under a similar certificate approving a similar contract with The Pennsylvania Railroad Company for the hauling of less-than-carload quantities of freight over a different route in this state.

Furthermore, it is interesting to note that the Pennsylvania Truck Lines, Inc., already has been granted a certificate by the Interstate Commerce Commission authorizing it to render the same service as to interstate freight shipments for the same railroad over the same route for which an intrastate certificate is now asked; and the provisions of the federal statute are not as broad as those of the state act, as is indicated by the following language of Part II, Section 203, paragraph 14 of the Interstate Commerce Act (Title 49, Chapter 8, Section 303, paragraph 14, U. S. Code):

“The term ‘common carrier by motor vehicle’ means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to Chapter 1”

According to the record, 86 per cent of the total number of shipments is interstate and 14 per cent intrastate. It would be an anomaly if the trucking company were held to be a common carrier by motor vehicle as to the 86 per cent but not as to the 14 per cent.

The second complaint by the appellants is that the evidence does not show public convenience and necessity for the proposed service. However, a study of the record fails to substantiate this contention. There were eight shippers among the witnesses. It was stated in part that the existing service for the transportation of less-than-carload quantities of freight is inadequate; that the proposed service will shorten the shipping time 24 to 48 hours, and that none of the protesting trucking companies is now serving the same route and stations. In its opinion appears the following comment by the Public Utilities Commission:

"It is shown by the testimony of record that the granting of this application will result in certain operating economies to the rail carrier, will release railroad equipment for other service, will expedite the movement of less-than-carload freight to a substantial degree, and will preserve an existing mode of transportation for those of the public who desire to avail themselves of this facility.

"There is no substantial complaint or showing in the record that existing motor transportation companies serving in the territory involved will in any manner be injured by the granting of this application—restricted as it will be. There is no doubt that the benefits above outlined will result from the proposed service."

The only remaining complaint requiring comment is that arising from the failure of the Public Utilities Commission to comply with the provisions of Section 614-87, General Code, by giving existing carriers a period of not less than 60 days in which to provide the service before the new certificate of convenience and necessity was granted. This court frequently has held that if a different and specialized or limited transportation service is required and proposed, a new certificate authorizing such service may be granted without first affording existing motor transportation companies an opportunity to provide such service. In the fourth paragraph of the syllabus in the case of *H. & K. Motor Transportation, Inc., v. Public Utilities Commission*, 135 Ohio St., 145, 19 N. E. (2d) 956, this rule was stated as follows:

"Where the public convenience and necessity demand a specialized type of motor transportation service of a kind and character different from that afforded by motor transportation companies already operating under certificates over the same route, a certificate of public convenience and necessity may issue to a motor transportation company limited to such specialized service without first affording such other motor transportation companies an

opportunity to furnish such specialized and limited service

In view of the facts disclosed by the record in this case the order of the Public Utilities Commission is neither unreasonable nor unlawful and must be affirmed.

Order affirmed.

ZIMMERMAN, BELL, WILLIAMS, TURNER, MATTHIAS and
HART, JJ., concur.